

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERMAINE MOYE,	§
	§
Defendant Below-	§ No. 83, 2012
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID Nos. 1105024046 and
Plaintiff Below-	§ 1109009433
Appellee.	§

Submitted: July 16, 2012

Decided: July 25, 2012

Before **HOLLAND, BERGER** and **RIDGELY**, Justices.

ORDER

This 25th day of July 2012, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Jermaine Moye, was charged with multiple criminal offenses pursuant to two separate indictments. On October 19, 2011, Moye pled guilty to one count each of Burglary in the Second Degree and Possession of a Deadly Weapon by a Person Prohibited. After a presentence investigation, the Superior Court sentenced Moye to a total period of eleven years at Level V incarceration, to be suspended after

serving eighteen months in prison for six months at Level IV, followed by four years at Level III probation. This is Moye's direct appeal.

(2) Moye's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Moye's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Moye's attorney informed him of the provisions of Rule 26(c) and provided Moye with a copy of the motion to withdraw and the accompanying brief. Moye also was informed of his right to supplement his attorney's presentation. Moye has raised two issues for this Court's consideration. The State has responded to Moye's arguments, as well as the position taken by Moye's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and

determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(4) Moye has raised two issues in response to his counsel's brief. First, he contends that the Superior Court's imposition of a four year period at Level III probation is illegal because it violates 11 Del. C. § 4333(b)(1).² Next, he asserts that the prosecutor engaged in misconduct. We find no merit to either claim.

(5) Section 4333(d)(2) of Title 11 authorizes the Superior Court to impose a longer period of probation for a violent felony, such as Burglary in the Second Degree, if public safety will be enhanced.³ In this case, the Superior Court explained on the record at Moye's sentencing that because of Moye's past history of violence and his history of mental illness, public safety required that the court impose more than a two-year period of probation. Under these circumstances, we find no error in the Superior Court's imposition of an extended period of probation.

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

² DEL. CODE ANN. tit. 11, § 4333(b)(1) (2007) provides that the length of any period of probation or suspension of sentence for a violent felony, which is defined by Section 4201(c) to include Burglary in the Second Degree, shall be limited to two years. Pursuant to Section 4333(g)(2), the phrase "period of probation or suspension of sentence" does include time to be served at Level IV.

³ *Id.* § 4333(d)(2) provides that the two-year limitation on probationary sentences for violent felonies does not apply "if the sentencing court determines on the record that public safety will be enhanced by a longer period of probation...."

(6) Moye's second claim is that the prosecutor engaged in misconduct by arguing for an enhanced sentence based on Moye's prior conviction for Rape in the Fourth Degree. Moye contends that the prosecutor took the case personally because she is a female and Moye is a prior sex offender. Moye points to nothing in the record to support this claim, and we find no evidence of misconduct because of the prosecutor's argument in favor of extended probation based on Moye's prior criminal history. Accordingly, that claim is without merit.

(7) This Court has reviewed the record carefully and has concluded that Moye's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Moye's counsel has made a conscientious effort to examine the record and the law and has properly determined that Moye could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice